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Supreme Court, U.S.
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No. 87-1393

In The
Supreme Court of the United States
October Term, 1987

ARTHUR LISAK,

Petitioner,

vs.

MERCANTILE NATIONAL BANK OF INDIANA,
MERCANTILE BANCORP., INC., JOHN WIDMAR,
HARRY F. SMIDDY, JR.; and
UNKNOWN DEFENDANTS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS MERCANTILE
NATIONAL BANK OF INDIANA, MERCANTILE
BANCORP., INC. AND HARRY F. SMIDDY, JR.,
IN OPPOSITION TO THE PETITION
FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether this Court, in the circumstances present here, has jurisdiction to review an order of an Indiana trial court.

**LISTING REQUIRED BY SUPREME COURT
RULE 28.1 OF PARENT COMPANIES,
SUBSIDIARIES AND AFFILIATES**

This brief is being filed on behalf of Mercantile National Bank of Indiana, Mercantile Bancorp, Inc., and Harry F. Smiddy, Jr., hereinafter called the "respondents."

The respondent, Mercantile National Bank of Indiana, is a national banking association which:

- 1) Is wholly owned by the respondent, Mercantile Bancorp, Inc.,
- 2) Has no subsidiaries, and
- 3) Is affiliated through a community of ownership and management with First National Bank of Illinois, Lansing, Illinois, and Home State Bank of Crystal Lake, Illinois.

The respondent, Mercantile Bancorp, Inc., is an Indiana corporation which:

- 1) Has no parent corporation,
- 2) Holds all the outstanding shares of the respondent, Mercantile National Bank of Indiana, and
- 3) Has no affiliates.

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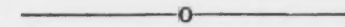
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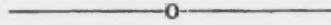
JURISDICTION

The respondents' position is that by virtue of 28 U.S.C. Section 1257 this Court lacks jurisdiction in this case because the petitioner is seeking to have this Court review an order of an Indiana court which is not the highest court of the State of Indiana in which a decision could be had.



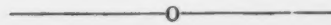
STATUTE INVOLVED

The statute involved is 28 U.S.C. Section 1257. The pertinent language of that statute is set forth in the argument portion of this brief.



STATEMENT OF THE CASE

The respondents accept the petitioner's statement of the case.



SUMMARY OF ARGUMENT

This Court is without jurisdiction to review the February 23, 1978 order of the Indiana trial court, because in so doing, this Court will not be reviewing a final judgment of the highest court of a state in which a decision could be had, as required by 28 U.S.C. Section 1257.

ARGUMENT

This brief is being submitted on behalf of the respondents, Mercantile National Bank of Indiana, Mercantile Bancorp., Inc., and Harry F. Smiddy, Jr. However, it appears that of these three respondents, only the respondent, Mercantile National Bank of Indiana, will be affected by this Court's ruling on the petition for a writ of certiorari, hereinafter called the "petition." If we are incorrect on this point, the petitioner will no doubt make mention of our error in his reply brief, if he sees fit to file one.

As best we can decipher the arguments presented in the petition, the focal point of those arguments is the February 23, 1978 order of the Indiana trial court which in effect required the petitioner to make a security deposit of five thousand dollars (\$5,0000.00) with the clerk of the trial court before the petitioner would be permitted to commence an appeal. A copy of that order appears as Appendix D to the petition. The effect of this requirement, according to the petitioner, was to deprive him of the absolute right of appeal guaranteed to him by the Indiana Constitution.

The petitioner next proceeds, apparently, to equate the alleged violation of the Indiana Constitution with a deprivation of the petitioner's due process and equal protection rights under the Fourteenth Amendment of the Constitution of the United States. The connection between the foregoing state and federal constitutional rights is merely assumed, never explained.

On the other hand, the objective of the petitioner's attack against the Indiana trial court's order of February

23, 1978 is more easily discerned from the petition. The petitioner thereby hopes to avoid the preclusive effect of the Indiana trial court's judgment. We are never told in the petition why that preclusive effect must be denied other than that "The denial of this substantial Due Process right by the Indiana Court itself requires the judgment of the Indiana Court to be not binding upon the Federal Court not entitled to full faith and credit by 28 U.S.C. Section 1738. *Grunone v. Zollinger*, 341 F.2d 464 (7th Cir. 1965)." (Petition, p.7). *Grunone v. Zollinger*, cited in the foregoing quotation from the petition, involved a situation in which the initial litigation had not been a good faith, adversary proceeding. We are at a loss to know why the case was cited by the petitioner. Although the petitioner has not simply said so, his apparent basis for attacking the preclusive effect of the Indiana judgment is the contention that he was denied a full, and fair opportunity to litigate by the bond requirement.

Assuming that the Indiana trial court would have enforced its order of February 23, 1978 and would have prohibited the commencement of an appeal in the absence of the petitioner's compliance with the cash bond requirement, the petitioner's remedy would have been to attack the trial court's jurisdiction to impose and enforce such a burden upon the right to appeal. Such an attack in Indiana would have taken the form of an original action for a writ of mandamus.

Under Indiana Original Action Rule 1(A) and (B) the Indiana Supreme Court has exclusive jurisdiction over such original actions:

“ORIGINAL ACTION RULE 1. SCOPE OF RULES

“(A) *Jurisdiction of Supreme Court Over Original Actions for Writs of Mandamus or Prohibition.* The Supreme Court has exclusive, original jurisdiction to supervise the exercise of jurisdiction of all inferior state courts, including the Court of Appeals, by virtue of Indiana Constitution, Article 7, Section 4, and Appellate Rule 4(A)(5).

“(B) *Nature of Original Actions Governed by These Rules.* Actions commenced in the Supreme Court pursuant to the authority in section (A) above for writs of mandamus or prohibition against inferior state courts and the judge or judges thereof and concerned solely with the question of jurisdiction shall be known as original actions and shall be governed exclusively by these Rules.”

In *State v. Hendricks Circuit Court*, 1967, Ind., 231 NE2d 145, the Indiana Supreme Court held that its entry of a writ of mandate against an Indiana trial court was proper where that court had entered an order striking the relators’ motion for a new trial. Because the issue the relators desired to present on appeal was the overruling of their motion for new trial, the trial court’s striking of the motion for new trial meant that no issue remained which could be the basis of an appeal. Consequently, appeal did not provide the relators with an adequate remedy.

Likewise in the case at hand, the trial court’s enforcement of the bond requirement included in the court’s order of February 23, 1978 would have prevented the petitioner from filing the praecipe necessary to initiate an appeal thus making it impossible for the petitioner to comply with Indiana Appellate Rule 2(A):

“(A) *Initiation of the Appeal.* An appeal is initiated by filing with the clerk of the trial court a praecipe designating what is to be included in the record of the proceedings, and that said praecipe shall be filed within thirty days after the court’s ruling on the Motion to Correct Errors or the right to appeal will be forfeited. A copy of such praecipe shall be served promptly on the opposing parties.”

Obviously, if the trial court’s action had caused the petitioner to forfeit his right to appeal, then for the petitioner appeal would no longer have presented an adequate remedy. The only alternative available to the petitioner, if he wished to pursue the matter further, would have been to apply to the Indiana Supreme Court for a writ of mandamus. However, this was never done. The issue could have been presented to the Indiana Supreme Court, the highest state court in Indiana, but the issue was not so presented.

28 U.S.C. Section 1257 provides in part as follows:

“Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

“(1) ...

“(2) ...

“(3) By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

“... ”

In *Costarelli v. Massachusetts*, 1975, 421 U.S. 193, 95 Sup. Ct. 1534, 44 L.Ed.2d 76, this Court held that 28

U.S.C. Section 1257 limited this Court's review to the judgment of the highest state court in which a decision could be had. In the *Costarelli* case, Costarelli had taken an appeal directly to this Court from the Superior Court for Suffolk County, Massachusetts. This Court found that Costarelli could have appealed to the Supreme Judicial Court of Massachusetts, the highest court of the state in which a decision could be had, but he had not. Therefore, because no decision had been had in that court, this Court held that it lacked jurisdiction in the case.

In effect, the petitioner in the case at hand is attempting to accomplish by indirect means that which he would not have been permitted to accomplish directly, i.e., the submission of the Indiana trial court's order of February 23, 1978 directly to this Court for review without the benefit of a review of said order by the Indiana Supreme Court. The petitioner has seen fit to skirt around the Indiana Supreme Court by starting up a new action in the federal courts and coming to this Court via that route rather than by way of the Indiana Supreme Court. However, 28 U.S.C. Section 1257 is not concerned with the procedural niceties employed by a party in order to get his case before this Court. When state court decisions are involved, only "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by" this Court. We submit that this Court is without jurisdiction to perform the review being sought by the petitioner.

CONCLUSION

In conclusion, the petitioner would have this Court exceed its jurisdiction by reviewing an order of an Indiana trial court when that order has never been considered by the Indiana Supreme Court, the highest court of Indiana in which a decision could be had. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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